LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAR 29 1971
E. ROBERT SEAVER, CLERK

NO. 1519

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

HENRY GRADY WHITEHEAD, SR.
and ARMEL DAYTON O'NEAL, *Petitioners*

VERSUS

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

C. O. McMILLAN
Box 612
Stephenville, Texas 76401
Attorney for Petitioners

Fort Worth Relief Printing Co., 310 E. Jessamine Street Phone [illegible]

INDEX

Pages

Opinion of Court of Appeals 1

Jurisdiction 2

Questions Presented 3

Statement of the Case 3

Argument 5

Signature 6

Certificate of Mailing 6

Appendix 7

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

HENRY GRADY WHITEHEAD, SR.
and ARMEL DAYTON O'NEAL, *Petitioners*

versus

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE SUPREME COURT:

Petitioners, Henry G. Whitehead, Sr. and Armel Dayton O'Neal, pray for Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit in Cause No. 29,498, United States of America v. Henry G. Whitehead, Sr., Armel Dayton O'Neal and Lamarr C. Bailey, in such Court.

OPINION OF COURT OF APPEALS

The Court of Appeals affirmed the judgment of the trial court without written opinion under Local Rule 41. The copies of the order of the Court affirming the judgment of the trial court and overruling and denying the petition for rehearing appear in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on the 4th day of February, 1971. A motion for rehearing was timely filed and this motion was denied on the 1st day of March, 1971. The jurisdiction of this Court is invoked under the provisions of 28 *U.S.C. Section 1254(1).*

QUESTIONS PRESENTED

Insofar as the petitioner, Henry Grady Whitehead, Sr., is concerned, the issue is whether the evidence is sufficient to connect him with the purchases of merchandise made by other defendants.

Insofar as Armel Dayton O'Neal is concerned, the issue is whether the trial court was in error in overruling his objections to evidence.

STATEMENT OF THE CASE

This is an appeal from a conviction of the petitioners on nine counts of an indictment charging fraudulent use of the United States Mail and of interstate telephonic communications and conspiracy.

The petitioner, Armel Dayton O'Neal, was sentenced to serve five years on counts one, two, three, four and nine in the indictment and was sentenced to an additional five years on counts five, six, seven and eight, such additional sentence being probated.

The defendant, Henry Grady Whitehead, Sr., was sentenced to imprisonment for a period of five years on all counts.

The indictment in its first count charged that Henry Grady Whitehead, Sr., Armel Dayton O'Neal and Lamarr Carlyse Bailey, together with a co-schemer, not named as a defendant, devised a scheme to defraud persons, corporations, businesses and firms in various parts of the United States by inducing them to sell goods, wares and merchandise to the petitioners. A part of the scheme alleged was the creation of a corporation under the name of "XIT Corporation" and making false representations as to the assets of the corporation. It was alleged that Henry Grady Whitehead, Sr. would usually make sales of the merchandise for the petitioners and often used the facilities of a store operated by him in Fort Worth, Texas for this purpose.

It was alleged that the petitioners sent by United States mail a promissory note to Universal Supply Company in Kansas City, Kansas; that petitioners transmitted and caused to be transmitted telephonic wire communications from Fort Worth, Texas to the offices of Universal Supply Company, Inc. in Kansas City, Kansas; that the petitioners caused William Hooker of Dallas, Texas to have long-distance telephone conversations with representatives of Huffman Manufacturing Company of Dayton, Ohio; that petitioners caused to be mailed to Huffman Manufacturing Company, Dayton, Ohio, a purchase order for merchandise; that petitioners caused to be mailed by United States mail a purchase order to Sony, Long Island City, New York; that petitioners caused to be mailed to Merit Enterprise, Brooklyn, New York, a

purchase order for merchandise; that petitioners caused to be mailed to Durham Corporation of Cincinnati, Ohio, a purchase order and purported financial statement of XIT Corporation; and that petitioners did conspire to commit certain offenses and to willfully violate Sections 1341 and 1343, Title 18, United States Code.

It is not shown by any evidence in the record that the petitioner Whitehead personally participated in sending any character of message or communication to any point outside of the State of Texas in connection with the purchase of the various items of goods, wares and merchandise. All of this was shown to be done in his absence. Insofar as the first eight counts in the indictment are concerned, he could be convicted only if the evidence is sufficient to prove a conspiracy to do the acts charged. On the ninth count which charges conspiracy as a separate crime, of course the conspiracy must necessarily have been proved.

There is no direct evidence that he entered into a conspiracy with the other petitioner, and the only evidence presented is circumstantial evidence.

These circumstances, briefly, are that Whitehead in some manner loaned $3,000.00 to A. D. O'Neal; that A. D. O'Neal and the witness Applewhite deposited this money and it is traced to the account of XIT Corporation.

That H. G. Whitehead purchased certain items of equipment from XIT Corporation, giving his note therefor, which note had not been paid, and that he

sold these items to other individuals or firms for cash.

The objection to the evidence is presented on behalf of Armel Dayton O'Neal.

At the time the judgments were offered in evidence, that is, the judgments against Whitehead, during the testimony of Stanley W. Winford, Mr. Moore on behalf of O'Neal objected because O'Neal was not a party to the judgments and they were hearsay and not binding on him and were dated in 1963 or 1964 and too remote to be used; that they were not admissible to show pattern or system and not related to the indictment that the defendants are on trial for, and constitute an attack on the petitioner O'Neal when he has not taken the witness stand, and not in rebuttal of any evidence offered by O'Neal. This objection was overruled.

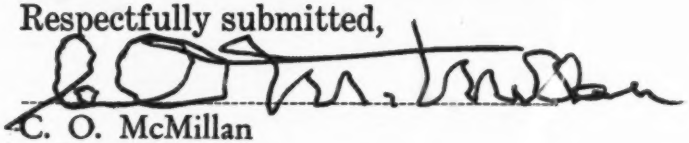
ARGUMENT

In the case against Whitehead, his knowledge of the transmissions of messages, either by letter or by wire communication in interstate commerce, is not proved either by the fact that he procured a loan of money to O'Neal, if he did, nor by the fact that he purchased goods from XIT Corporation which he did not pay for. The act of lending money is entirely consistent with the theory that he was merely making a loan. The act of purchasing goods and giving his note therefor and reselling the goods and not paying the note is as consistent with his dealing with O'Neal and Bailey as strangers as it is with his having become their partner or co-conspirator.

Insofar as O'Neal is concerned, the objection to the judgments against Whitehead which were introduced in evidence should have been sustained for the reason that O'Neal was not a party to these judgments; they were taken several years before the transactions for which he was on trial occurred, and were not in rebuttal to any evidence offered by O'Neal.

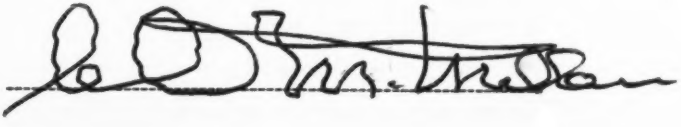
WHEREFORE, petitioners pray that Writ of Certiorari be granted and that upon final hearing, the judgments of the trial court and the Court of Appeals be reversed.

Respectfully submitted,



C. O. McMillan
Box 652
Stephenville, Texas 76401
Attorney for Petitioners

Three copies of the foregoing petition have been deposited in the United States Post Office at Fort Worth, Texas, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C. 20530. The 24 day of March, 1971.



APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29498

D. C. Docket No. 4-597-CR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HENRY GRADY WHITEHEAD, SR., ARMEL DAYTON O'NEAL and LAMARR C. BAILEY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

Before JONES, BELL and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel for appellants Whitehead and O'Neal; and was taken under submission by the Court upon the

record and briefs on file for appellant Bailey;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 4, 1971

Issued As Mandate: March 18, 1971
(As to Bailey only)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29498

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HENRY GRADY WHITEHEAD, SR., ARMEL DAYTON O'NEAL and LAMARR C. BAILEY,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

---

(March 1, 1971)

ON PETITION FOR REHEARING

Before JONES, BELL and SIMPSON, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1519

HENRY GRADY WHITEHEAD, SR., AND ARMEL DAYTON O'NEAL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals wrote no opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1971. A petition for rehearing was denied on March 1, 1971. On March 29, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner Whitehead's conviction as a co-conspirator in the scheme to defraud.

423-879—71

2. Whether a series of judgments recorded against Whitehead were properly admitted into evidence against petitioner O'Neal.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioners and a third defendant, Bailey, were convicted of eight substantive counts and one conspiracy count charging use of the mails and interstate telephone communications to defraud, in violation of 18 U.S.C. 1341 and 1343. On March 10, 1970, petitioner Whitehead was sentenced to concurrent terms of five years' imprisonment on all counts. Petitioner O'Neal was sentenced to concurrent terms of five years' imprisonment on five counts and five years' probation on the remaining counts to commence upon expiration of the term of imprisonment. The court of appeals affirmed.

The evidence disclosed that, in the early part of 1967, O'Neal, Bailey, and one Applewhite met in Whitehead's office in Fort Worth to discuss the formation of a corporation to be known as XIT Corporation (hereinafter referred to as "XIT")[1] ostensibly for the

[1] The name "XIT" was selected to convey the false impression that the corporation was a successor to the XIT Ranch ("XIT" meant "Ten in Texas") which had been a successful and well-known ranching operation in the region. The offices of the corporation were decorated with the XIT branding iron and pictures of ranch scenes. In dealing with prospective suppliers of XIT, as well as with the landlord for the offices, Bailey, O'Neal and one Starkey, named in the indictment as a co-conspirator and the purchasing agent for XIT, deliberately misrepresented that XIT was connected with the famous ranch and therefore had substantial financial backing (See, *e.g.*, Tr. 73–74, 346–347, 446, 601–602).

development of oil leases (Tr. 6–13).[2] On May 19, 1967, O'Neal and Whitehead secured a loan from the Mansfield State Bank for $3,000 with their promissory note. The loan was then deposited in the White Settlement National Bank in the name of XIT (Tr. 28a–29a; 44–48). This opening amount was the highest balance achieved on the XIT account during the life of the corporation (Tr. 59–60). A suite of offices was rented in the name of XIT on the same day (Tr. 19a, 69–70). XIT was incorporated on June 7, 1967 (Tr. 101–104). A spurious financial statement was prepared showing net assets totalling approximately three million dollars including stocks and land holdings never owned by XIT, and a bank balance falsely inflated by $131,000 (Tr. 56–59, 316–334). O'Neal became president of XIT and Bailey became vice-president. They hired Starkey to act as purchasing agent.

On June 5, 1967, Starkey telephoned the Universal Supply Company of Kansas City, Kansas, from the XIT office to arrange the purchase of television sets (Tr. 172–175). In response, the co-owner of Universal Supply, Robert Marvin, flew to Fort Worth and met with O'Neal, Bailey, and Starkey. After being assured of the corporation's solvency (Tr. 347–348), Marvin agreed to supply XIT with a large quantity of television sets and other home appliances on thirty-day credit for an agreed price of $25,626. He was told the sets would be resold in Jamaica (Tr. 211, 214, 216–217, 354–367). Universal Supply shipped the merchan-

[2] "Tr" refers to the three-volume transcript of trial proceedings. We are lodging a copy of this transcript with the Clerk of this Court.

dise to Starkey, who then shipped it to a warehouse in Fort Worth under the control of Whitehead (Tr. 223–232, 371–373, 728–729, 745). Whitehead purchased the goods from XIT, paying a small sum in cash and securing the rest with promissory notes. He, in turn, resold them for $13,000 cash (Tr. 765–767, 774–775, 792–798).

In like manner, XIT purchased on credit quantities of lawn mowers and bicycles from the Huffman Manufacturing Company of Dayton, Ohio, and two fork-lift trucks from the Baker Truck Division of Otis Elevator Company, Dallas, Texas. These were also sold by XIT to Whitehead with his promissory notes as security and resold by him at about half their original purchase price (Tr. 163, 533–564, 589–593, 621, 637, 760–762, 800–810). Other orders were mailed on behalf of XIT for merchandise from the Sony Company and Merit Enterprise, both of New York, the Durham Corporation in Cincinnati, Ohio, and others. These companies, however, never shipped anything to XIT (Tr. 493–528). Altogether, XIT purchased close to $47,000 of merchandise which Whitehead later resold for approximately $24,000. Whitehead defaulted on the seven promissory notes he executed in favor of XIT. XIT was dissolved at the end of August, 1967. XIT's suppliers were never paid for merchandise shipped to the corporation (See, *e.g.*, Tr. 367, 563, 621–622).

ARGUMENT

1. Petitioner Whitehead argues that the evidence was insufficient to support his conviction. The con-

tention is frivolous in view of the facts previously set forth. Whitehead was instrumental in obtaining the funds used to set up XIT and, throughout XIT's existence, remained its only customer. XIT purchased goods solely on credit and then, despite representations to suppliers that the merchandise would immediately be sold at substantial profit, resold them to Whitehead at a nominal profit to the corporation. Whitehead paid for the merchandise with a small amount of cash, the rest of the purchase price being secured by worthless promissory notes. Whitehead then resold the goods at what on paper appeared to be a substantial loss. Significantly, however, Whitehead sold only for cash and was therefore the only one to receive any actual return from the sales which took place. The jury was clearly warranted in concluding under the circumstances that Whitehead wilfully participated in a scheme to defraud XIT's suppliers.

Since the evidence plainly established Whitehead's role in the conspiracy, it is of no consequence that there was no proof he had actual knowledge that interstate mailing and telephone facilities would be used to order merchandise. XIT's obtaining goods from out-of-state suppliers was a necessary part of the scheme to defraud. The jury could readily infer that, as a conspirator, Whitehead reasonably contemplated that the orders would be negotiated and placed through the use of such facilities, as indeed they were. *Pereira* v. *United States,* 347 U.S. 1, 8; *Buie* v. *United States,* 420 F. 2d 1207 (C.A. 5), certiorari

denied, 398 U.S. 932; *Sherwood* v. *United States,* 300 F. 2d 603 (C.A. 5), certiorari denied, 371 U.S. 838.

2. One of the allegations in the indictment was that the defendants knew Whitehead did not intend to honor the promissory notes he executed in favor of XIT. In support of this allegation, the government introduced a series of judgments against Whitehead rendered in 1963 in Tarrant County, Texas. These were based upon his default on 127 promisory notes having a total value of $175,000 (Tr. 702–723). Other evidence showed that, while XIT instituted a lawsuit against Whitehead after his default on the notes, the corporation made no attempt to pursue the suit and it was finally dismissed for want of prosecution in 1969 (Tr. 752–787). The evidence showed that the promissory notes, and hence the supposed transactions between XIT and Whitehead, were a sham.

There is no basis for petitioner O'Neal's contention that the judgments were inadmissible with respect to him. The judgments were properly introduced as part of an effort to show that the conspirators intended to cloak the purchases from XIT by Whitehead with an apparent air of legitimacy, although the defendants knew the XIT notes would be dishonored. Whitehead's failure to honor his own promissory notes in the past, which was a matter of public record, was a fact the jury was entitled to consider in determining the fraudulent intent of the defend-

ants.[3] *New England Enterprises, Inc.* v. *United States,* 400 F. 2d 58 (C.A. 1), certiorari denied, 393 U.S. 1036; *United States* v. *Cobb,* 397 F. 2d 416 (C.A. 7), certorari denied, 393 U.S. 924. Cf. *Nye & Nissen* v. *United States,* 336 U.S. 613, 618.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
RONALD G. SCHERAGA,
Attorneys.

APRIL 1971.

[3] Even assuming that the judgments were not properly admitted against O'Neal, he makes no showing that he was prejudiced in any way by their admission. He was not a party to the judgments and had no connection with them. Any incidental prejudice to O'Neal resulting from their introduction into evidence was obviated by the trial judge's careful instruction to the jury not to consider the acts of one defendant against another unless done in his presence, adopted by him, or done in furtherance of the conspiracy (Tr. 877–881).

U. S. GOVERNMENT PRINTING OFFICE: 1971